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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA, *Appellant*

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, *Appellee*

On Appeal From the United States Court of Claims

APPELLEE'S MOTION TO AFFIRM JUDGMENT OF UNITED STATES COURT OF CLAIMS AND/OR TO DISMISS APPEAL

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PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, *Appellee*

On Appeal From the United States Court of Claims

APPELLEE'S MOTION TO AFFIRM JUDGMENT OF UNITED STATES COURT OF CLAIMS AND/OR TO DISMISS APPEAL

Appellee, Patricia Ilene Clark, Guardian for Shawn D. Clark and Tricia D. Clark, minor children, hereby respectfully moves, in the alternative and pursuant to Rule 16 of the Supreme Court Rules, for an order which (a) affirms the judgment of the United States Court of Claims herein and/or (b) dismisses the appeal in this case on the following grounds:

1. The appeal should be dismissed because it is not within this Court's jurisdiction under 28 U.S.C. 1252.

2. The judgment of the United States Court of Claims should be affirmed because the questions actually presented for decision are manifestly unsubstantial and thus do not require further argument at this time.

3. The appeal should be dismissed and the judgment of the Court of Claims affirmed on the following additional grounds:

(i) It is settled by prior recent decisions of this Court that the United States Court of Claims has jurisdiction over money claims against the United States founded upon any Act of Congress (*United States* v. *King,* 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *United States* v. *Testan,* 424 U.S. 392, 397-399, 96 S. Ct. 948, 952-953, 47 L.Ed.2d 114 (1976)); and this case plainly presents exclusively a money claim against the United States based on the Civil Service Retirement Act of 1930, as amended, 5 U.S.C. §§ 8331, et seq. Thus, the Government's contention that the Court of Claims did not have jurisdiction over this case is patently frivolous and unsustainable.

(ii) It is also settled by a line of prior recent decisions of this Court that it is unconstitutional and impermissible for federal or state laws to discriminate against illegitimate children of a father, otherwise eligible for statutory benefits, when the discrimination is not justified by any legitimate governmental interest, *especially in cases where the paternity relationship was established by a court of competent jurisdiction during the father's lifetime and where the father supported the children prior to his death.* (*Jimenez* v. *Weinberger,* 417 U.S. 628, 94 S.Ct. 2496, 41 L. Ed. 2d 363 (1974); *Trimble* v. *Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977); *Lalli* v. *Lalli,* —— U.S. ——, 99 S.Ct. 518, —— L.Ed.2d —— (1978).) Here, the undisputed facts establish that the deceased federal employee, who fathered the minor children seeking death benefits under the Civil Service Retirement Act, was formally decreed their father by a Montana court of competent jurisdiction during his lifetime, and that he thereafter supported said children pursuant to the Montana decree until his death. Under such circumstances, the children are clearly entitled to their father's death benefits under the federal statute involved, irrespective of whether they constantly physically lived with him under the same roof.

(iii) Almost five (5) full years have elapsed since August, 1974, when the federal employee-father involved in this case died and the minor children's claim for survivor benefits was timely and properly filed under the federal statute. Under the circumstances described above and hereinbelow, and in light of the settled law plainly applicable to cases such as this, it would be manifestly unjust and inequitable to permit the Government to delay and frustrate the day of final reckoning any longer, or to force the minor children involved to pursue further lengthy, costly litigation before this Court.

OPINIONS BELOW

The summary judgment rendered by the Court of Claims on January 27, 1978 is printed in *Appendix A* to the jurisdictional statement. The final money judgment thereafter entered on November 6, 1978 pursuant to the Government's stipulation is printed in *Appendix B* to the jurisdictional statement.

JURISDICTION

The Government's jurisdictional claim is predicated *exclusively* on 28 U.S.C. 1252. Appellee respectfully submits this Court does *not* have jurisdiction over this case under 28 U.S.C. 1252 for three (3) reasons:

1. The Government did *not* appeal from the Court of Claims' order or summary judgment of *January 27, 1978* (*App. A,* jurisdictional statement) under 28 U.S.C. 1252 *"within thirty days after the entry of* [*that*] *interlocutory or final order, judgment or decree"* in the manner prescribed by 28 U.S.C. 2101(a)—and no extension of that appeal time was sought from or granted by this Court or any Justice thereof.

2. The summary judgment granted by the Court of Claims on January 27, 1978 (*App. A,* jurisdictional statement) does *not invalidate* or *hold unconstitutional,* in whole or in part, any Act of Congress. Rather, pursuant to the Government's concession that a prior 1976 decision of the Court of Claims in *Gentry* v. *United States,* 212 Ct.Ct.1, 546 F.2d 343—*from which the Government took no appeal—"is dispositive of the case now before us,"* [1] the Court of Claims simply granted summary judgment in favor of the minor children for survivor benefits under 5 U.S.C. 8341(e), the Civil Service Retirement Act.[2]

3. The subsequent money judgment entered by the Court of Claims on November 6, 1978 *pursuant to the Government's stipulation,*[3] likewise does *not invalidate* or *hold unconstitutional* any Act of Congress, as required by 28 U.S.C. 1252. Rather, said order merely grants a money judgment in favor of the minor children and a third-party *pro confesso* judgment in favor of the United States against one George G. Isaacson, to whom the Civil Service Commission had previously erroneously and unlawfully paid survivor benefits.[4]

[1] See Jurisdictional Statement, *App.* A, pg. 3a.

[2] See Jurisdictional Statement, *App. A,* pgs. 3a, 4a.

[3] See *App. B,* jurisdictional statement, pg. 6a.

QUESTIONS PRESENTED

In truth and in fact, therefore, this case actually presents the following relatively unsubstantial questions for review:

1. Does this Court have jurisdiction over this particular case under 28 U.S.C. 1252 in view of (a) the Government's complete failure to file a timely appeal with reference to the Court of Claims' judgment and order of January 27, 1978, and (b) the fact that neither the Court of Claims' order and summary judgment of January 27, 1978 nor its subsequent "consent order" of November 6, 1978 in and of themselves actually invalidate or hold unconstitutional any Act of Congress?

2. Does the Court of Claims have jurisdiction under the Tucker Act (28 U.S.C. 1491) to render a money judgment based strictly on a money claim for statutory survivors' benefits under the Civil Service Retirement Act, as amended (5 U.S.C. § 8341(e))?

3. Is it permissible for the Civil Service Retirement Act to discriminate against illegitimate children of a deceased federal civil service employee by denying them statutory survivors' annuities to which they are other-

[4] Said third party, Mr. Isaacson, had stipulated in writing from the very outset of this case to refund the monies he had received if, as a matter of law, the minor children were entitled to the statutory benefits.

wise entitled solely because they did not constantly live with their deceased father under the same roof in a case where, during the lifetime of the father, a Montana court of competent jurisdiction decreed his paternity relationship to the children and pursuant to which the father supported said children to the time of his death?

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1491, as here relevant, is set forth in the jurisdictional statement, at page 3.

2. The Civil Service Retirement Act, 5 U.S.C. 8341 (a)(4)(A), as here relevant, is likewise set forth in the jurisdictional statement, at page 3.

COUNTER-STATEMENT OF THE CASE

The Court of Claims' summary judgment in this case is based on the following undisputed facts:

Prior to his death on August 17, 1974, George G. Isaacson was a federal civil service employee employed by the Veterans Administration in Fort Harrison, Montana. Shawn Douglas Clark and Tricia Deanne Clark, his children and both of whom are minors, were born in 1968 and 1971 respectively. At the time of their births, their father, Mr. Isaacson, and their mother, Patricia Ilene Clark, appellee herein, were not married, and they were not subsequently married prior to Mr. Isaacson's death on August 17, 1974 in an automobile accident.

On June 2, 1972, however, more than two (2) years before Mr. Isaacson's death, a judgment was rendered by the District Court for the First Judicial District of Montana, County of Broadwater, in an action entitled *Patrcia Ilene Clark* v. *George G. Isaacson,* copy of which is *Appendix A* to this motion. The Montana judgment specifically decreed that *"the defendant, George Gerald Isaacson, is the father of Shawn Douglas Clark and Tricia Deanne Clark,"* and pursuant to a stipulation accepted by the Court, Mr. Isaacson was ordered in specific detail to support Shawn and Tricia through monthly payments and other means (see *App. A* hereto).

Accordingly, up to the time of his death in August, 1974, Mr. Isaacson regularly complied with the Montana decree and provided support payments and other benefits to his two children.

Shortly after Mr. Isaacson's death in 1974, appellee, as guardian of the two minor children, filed a timely, appropriate application with the Civil Service Commission's Bureau of Retirement, Insurance and Occupational Health seeking payment of the "Survivors' Annuities" prescribed by 5 U.S.C. 8341 for children of civil service employees who die without a surviving spouse (5 U.S.C. 8341(e)(1)). Under 5 U.S.C. 8341(a)(4), such annuities are payable to *any unmarried child* under 18 years of age, *including*—

> "(i) an *adopted* child, and
>
> "(ii) a *stepchild* or *recognized natural child* who lived with the employee . . . in a regular parent-child relationship." [Italics supplied.]

On September 27, 1974, however, the Commission's Bureau of Retirement, Insurance and Occupational Health denied appellee's claim on the ground that Shawn and Tricia "did not qualify for a survivor annuity since they did not live with the decedent in a regular parent-child relationship." The Bureau thus

directed that said annuity be paid to Mr. Isaacson's surviving father in one lump sum payment.

Appellee appealed to the Civil Service Commission's Board of Appeals and Review. On January 7, 1976, after an unconscionable delay, the Board affirmed the Bureau, stating in part:

> "The fact that an individual adjudged by a Montana court to be the father of illegitimate children is required by court order to support the children and name them as beneficiaries of life insurance policies is not dispositive of the issue of whether the children are legitimate or illegitimate . . . .
>
> "The Board notes appellant's argument that 5 U.S.C. 8341 is unconstitutional. However, until this provision of the retirement law is held unconstitutional by a court of competent jurisdiction, the Commission has no alternative but to continue its enforcement."

On July 9, 1976, therefore, appellee commenced the instant action in the United States Court of Claims demanding payment of the survivor's annuity lawfully owed to Shawn and Tricia under 5 U.S.C. 8341, and after the Government filed its answer, she moved for summary judgment.

On November 17, 1976, the Court of Claims rendered its judgment in another case, *Gentry* v. *United States,* 212 Ct.Cl.1, 546 F.2d 343 (1976), rehearing denied 212 Ct.Cl.27, 551 F.2d 852 (1977). In that case, the court ruled (a) it had full statutory jurisdiction under the Tucker Act (28 U.S.C. 1491) over claims for statutory survivor annuities unlawfully withheld by the Government under the Civil Service Retirement Act (5 U.S.C. 8341), and (b) that the *"live-with"* or *"residence"* requirement of 5 U.S.C. 8341(a)(4)(A) is *"severable*

from the legislative scheme of that statute, when read in light of the Fifth Amendment," because it conflicts with the overall aim of the statute, which is to aid dependents of federal employees; it does not promote any goal of preventing spurious claims; and it cannot be sustained as a recognizable aid to administrative convenience.

The Government failed to file or prosecute any appeal to this Court from the Court of Claims' judgment in *Gentry.* Indeed, in its jurisdictional statement in this case, the Government recognizes that *"Several other lower federal courts have declared the lived-with requirement [of 5 U.S.C. 8341] unconstitutional,"* and that none of those decisions have been disturbed by this Court, albeit the issue has been here before.[5]

Thus, in this case, after the decision in *Gentry,* the Government notified the Court of Claims that, in its view, *"Gentry, supra, is dispositive of the case now before us."* So, without discussing in the slightest any of the jurisdictional or constitutional issues settled by *Gentry,* the Court of Claims, on January 27, 1978, granted appellee's motion for summary judgment in this case, stating:[6]

> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. § 8341(e)."

As indicated above, the Government filed *no* appeal from this judgment under 28 U.S.C. 1252 within the 30-day period prescribed by 28 U.S.C. 2101(a)—and

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[5] See Jurisdictional Statement, pg. 7, ftnt. 5.

[6] See Jurisdictional Statement, *App. A,* pg. 3a.

ultimately, after further unconscionable procrastination and delay, it agreed to stipulate without qualification to the entry of a money judgment in favor of Shawn and Tricia. That judgment issued on November 6, 1978. Then, and only then, did the Government file a Notice of Appeal on December 5, 1978. Still, it delayed the filing of its jurisdictional statement until April 4, 1979—*so that for almost five (5) full years, it has successfully deprived the two minor children involved in this case of their lawful annuity.*

Now, the Government advises this Court in its jurisdictional statement that, while it thus continues relentlessly and capriciously to press its malingering, baseless defense against Shawn and Tricia Clark,—[1]

> "OPM has recommended proposed legislation to the current Congress that it eliminate the lived-with requirement [from 5 U.S.C. 8341(a)(4)(A)] S. 509, 96th Cong. 1st Sess. (1979); H.R. 2584, 96th Cong., 1st Sess. (1979) . . . ."

ARGUMENT

I.

This Court Does Not Have Jurisdiction Over This Particular Case Under 28 U.S.C. 1252

A. No appeal was taken from the court of claims' judgment of January 27, 1978 for more than ten (10) months

28 U.S.C. 1252 provides that an appeal may be taken from either "an interlocutory or final judgment, decree or order . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." 28 U.S.C. 2101(a), in turn, prescribes that the appeal to this Court under 28 U.S.C.

[1] See Jurisdictional Statement, pg. 10, ftnt. 8.

1252 *"shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree."*

In this case, whether the Court of Claims' summary judgment of January 27, 1978 be deemed "interlocutory" or "final," the Government took no appeal therefrom under 28 U.S.C. 2101(a) *for more than ten (10) months,* and it took no *timely* action to obtain any extension of time from this Court or a Justice thereof. *Ergo,* this Court is without jurisdiction and the appeal must be dismissed (*Whitsitt* v. *Union Depot & R.R. Co.,* 122 U.S. 363, 7 S.Ct. 1248, 30 L.Ed. 1150 (1887); *Glasgow Navigation Co., Ltd.* v. *Munson Steamship Line,* 246 U.S. 647, 38 S.Ct. 315, 62 L.Ed. 919 (1918); *Collard* v. *Pittsburgh, C.C. & St. L. Ry. Co.,* 246 U.S. 653, 38 S.Ct. 336, 62 L.Ed. 922 (1918); *Citizens Bank of Michigan City* v. *Opperman,* 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919); *Rust Land & Lbr. Co.* v. *Jackson,* 250 U.S. 71, 76, 39 S.Ct. 424, 63 L.Ed. 850 (1919); *Toledo Scale Co.* v. *Computing Scale Company,* 261 U.S. 399, 417, 418, 43 S.Ct. 458, 67 L.Ed. 719 (1923); *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, 175, 176, 52 S.Ct. 456, 76 L.Ed. 1301; *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 415, 63 S.Ct. 1126 (1943); *Cole* v. *Violette,* 319 U.S. 581, 63 S.Ct. 1204 (1943); *Parish* v. *Maryland and Virginia Milk Producers Association, Inc.,* —— U.S. ——, S.Ct. No. 78-1246 (1979)).

In *McLucas* v. *De Champlain,* 421 U.S. 21, 31, 95 S.Ct. 1365, 1371, 43 L.Ed.2d 699 (1975), this Court construed 28 U.S.C. 1252 to authorize and require *"immediate review in this Court,"* irrespective of the form of lower

court order which allegedly invalidates an Act of Congress. Mr. Justice Powell, writing for the Court, stated:

> "The language of the statute sufficiently demonstrates its purpose: to afford *immediate review* in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unstitutionality. The purpose of § 1252 is too plain to allow circumvention . . . ."

Thus, even assuming *arguendo* that the Court of Claims' January 27, 1978 decision in this case was originally reviewable under 28 U.S.C. 1252 (when it was issued more than fifteen (15) months ago), it is no longer reviewable under that statute because no appeal was taken within thirty (30) days as mandated by 28 U.S.C. 2101(a).

B. This Court also lacks jurisdiction under 28 U.S.C. 1252 over either the Court of Claims' Judgment of January 27, 1978 or the Consent Order of November 6, 1978 because neither invalidates an Act of Congress, in whole or in part

As this Court stated in *McLucas* v. *De Champlain, supra,* the sole purpose of 28 U.S.C. 1252 is "to afford immediate review in this Court" in cases where the United States will be "*bound by a holding of unconstitutionality*" (421 U.S. 31). But here, the federal statute in issue (5 U.S.C. 8341(a)(4)(A)) was deemed partially violative of the Fifth Amendment in a completely separate case, *Gentry* v. *United States, supra,* in 1976—a decision rendered more than fourteen (14) months *before* the Court of Claims' initial ruling in this case in January, 1978—and, of course, the Government took *no appeal* from that 1976 judgment.

Moreover, the Government concedes that, in addition to *Gentry* and prior to the Court of Claims' judgment of January 27, 1978 in this case, "several other lower federal courts declared the live-with requirement unconstitutional"—and that again, either *no appeals* were taken or the appeal taken in one instance was ultimately fruitless.[8] Accordingly, the Government itself is now asking Congress to delete the "live-with" requirement from 5 U.S.C. 8341(a)(4)(A).

With this background, even a cursory reading of the Court of Claims' judgment of January 27, 1978 and its subsequent "consent order" of November 6, 1978 herein make it clear that neither *"invalidated"* or *"held unconstitutional"* an Act of Congress within the meaning or purpose of 28 U.S.C. 1252. On the contrary, the summary judgment of January 27, 1978 was based entirely on the Government's *concession* that *"Gentry, supra,* is dispositive of the case now before us"—and thus, without further ado, judgment was rendered in favor of Shawn and Tricia Clark on the basis of the Court's finding:[9]

> "In summary, on the uncontested facts . . . , plaintiffs have shown that they have a right to recover the benefits provided by U.S.C. § 8341(e)."

The subsequent "consent order" of November 6, 1978 was based on the Government's "stipulation for entry of judgment."[10]

Neither ruling by the Court of Claims discusses in the slightest the basis for the court's earlier holdings

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[8] See Jurisdictional Statement, pg. 7, ftnt. 5.

[9] See Jurisdictional Statement, *App. A*, pg. 3a.

[10] See Jurisdictional Statement, *App. B*, pg. 6a.

in *Gentry*. Such discussion was plainly unnecessary here, because the Government chose to acquiesce in a mere summary ruling on the merits in this case. Now, the Government which failed to appeal in *Gentry* in the manner prescribed by law, is trying belatedly and unjustly to appeal from *Gentry* in this case. Nothing in 28 U.S.C. 1252 or 28 U.S.C. 2101(a) authorizes any such procedure—indeed, the entire attempt is patently contrary to the whole purpose of 28 U.S.C. 1252 as defined by this Court in its recent decision in *McLucas* v. *De Champlain, supra.*

For all these reasons, appellee respectfully submits this Court does not have jurisdiction under 28 U.S.C. 1252 at this late date in 1979 over either the Court of Claims' 1976 rulings in *Gentry* or over the Court of Claims' January 27, 1978 summary judgment in this case, or over the mere "consent order" entered by stipulation in this case on November 6, 1978.

II.

The Court of Claims Plainly Had Jurisdiction Over the Money Claim for Survivors' Annuity Under the Civil Service Retirement Act

Throughout its entire history, since it was established in 1855, the Court of Claims has had jurisdiction over money claims against the United States based on an Act of Congress (*United States* v. *King,* 395 U.S. 1, 2-3, 89 S.Ct. 1501, 1502 (1969); *United States* v. *Testan,* 424 U.S. 392, 397-398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976)). In this case, appellee's claim on behalf of the minor children is strictly a money claim for statutory survivors' annuity based on the Civil Service Retirement Act (5 U.S.C. 8341(e)). That Act of Congress *specifically* sets forth the *amounts of money* due and

payable to children of deceased federal employees (5 U.S.C. 8341(e)), and here the suit seeks collection of that *statutory debt* of the United States to Shawn and Tricia Clark, the children of a deceased civil service employee covered by that statute.

Their action asserts, and the Court of Claims has ruled, that the Act "confers a substantive right [on the Clark children] to recover money from the United States" (*United States* v. *Testan,* at 424 U.S. 398). And, of course, by expressly providing this statutory commitment to pay the survivors' annuity to children of deceased employees—even to *adopted children* and *stepchildren* (5 U.S.C. 8341(a)(4)(A)—the United States waived its sovereign immunity and made itself statutorily liable for such payments (*United States* v. *Testan,* at 424 U.S. 399).

Under the circumstances of this particular case, therefore, it is absolutely specious for the Government to argue that the Court of Claims either completely lacks jurisdiction over the statutory money claim here involved, or that somehow its jurisdiction should be limited to "prospective relief only"—i.e., the Court of Claims should be made powerless to award "monetary relief for past injury" (the survivors' annuity payable from the date of the deceased father's death in 1974 to the date of judgment in this case). *The Government cites no authority whatsoever for this novel, totally unjust contention other than its own brief before this Court in another case* (*Califano* v. *Boles,* No. 78-808).

Indeed, the very same contention was made by the Government in *Gentry* v. *United States, supra*—and it was soundly rejected by the Court of Claims in 1976 (see 546 F.2d 345-348). *The Government took no ap-*

peal from those jurisdictional rulings, now almost three (3) years old—and it completely failed to question the Court of Claims' jurisdiction in the proceedings below in this case. Rather, the Government stipulated for the entry of a money judgment under the governing retirement statute (Jurisdictional Statement, *App. B.).*

Patently, this bizarre jurisdictional argument was properly and soundly laid to rest in *Gentry,* and the Government's attempt to resurrect that dead issue now —in an entirely different case where it was never raised before—must be flatly rejected by this Court.

III.

In This Case, a Court of Competent Jurisdiction Ruled the Deceased Federal Employee Was the Father of the Minor Annuity Claimants and Ordered Him to Provide for Their Support—And He Did Support Them to the Time of His Death. Plainly, Therefore, the "Live-With" Provision of 5 U.S.C. 8341(a)(4)(A) Is Invalid Under the Fifth Amendment and All of This Court's Recent Rulings

As stated above, the Court of Claims made no constitutional rulings in this case, and it did not invalidate any Act of Congress, in whole or in part. Rather, it simply granted summary judgment in favor of the Clark children under 5 U.S.C. 8341 on the basis of the undisputed evidence presented in support of their claim and its earlier construction of 5 U.S.C. 8341 in

[11] As the Jurisdictional Statement recognizes in a footnote, at page 12, 28 U.S.C. 1491 specifically authorizes the Court of Claims to provide "an entire remedy." Here, the Court granted an appropriate money judgment under 5 U.S.C. 8341, so clearly it had the statutory authority under 28 U.S.C. 1491 to order the Civil Service Commission (now OPM) to place Shawn and Tricia on the annuity roles.

Gentry v. *United States, supra*—a construction from which the Government took no appeal.

But even assuming *arguendo* the Court of Claims' actions in this case could be construed as having adjudged the "live-with" provision of 5 U.S.C. 8341(a)(4)(A) violative of the Fifth Amendment in this particular litigation, patently that finding was correct and wholly in accord with this Court's recent decisions in *Jimenez* v. *Weinberger,* 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *Trimble* v. *Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed.2d 31 (1977); and *Lalli* v. *Lalli,* —— U.S. ——, 99 S.Ct. 518 (1978).

The Government contends in its Jurisdictional Statement (pgs. 6-10) that the sole purposes of the aforesaid "live-with" provision are—

> (1) to assist the Government in determining whether surviving children of federal employees are actually *dependent* on that deceased parent; and
>
> (2) to assist the Government *"easily and promptly to identify eligible children."*

But here, the record shows that, in 1972, long before the death of the federal employee involved, a court of competent jurisdiction in Montana conclusively ruled (*Appendix A* hereto)—

> (i) that the deceased federal employee was the lawful father of Shawn and Tricia Clark; and
>
> (ii) pursuant to the deceased federal employee's *stipulation,* that henceforth he provide monthly support and medical care for Shawn and Tricia, *and that he name them as his beneficiaries in his Federal Employees Group Life Insurance Policy.*

The undisputed record before the Court of Claims shows further that, to the date of his death, the federal employee-father made the regular monthly support and medical payments and that he listed his children, Shawn and Tricia, as beneficiaries in his Federal Employees Group Life Insurance Policy.

Here, therefore, a conclusive Montana court decree establishes both (a) *that Shawn and Tricia were "actually dependent" on their deceased father for support and (b) that Shawn and Tricia are promptly and easily identifiable as the dependent children of their deceased father.*

Under circumstances such as these, the "live-with" provision of 5 U.S.C. 8341(a)(4)(A) is insidiously discriminatory and violative of the Fifth Amendment. It allows *legitimate children* annuities irrespective of where they live—and they are eligible even if they never lived with a divorced federal employee-father, for example. It also allows *"adopted children"* and *"stepchildren"* full annuities, simply because they physically "lived with" a deceased federal employee-foster father or stepfather, while as construed by the Government in this case, it would foreclose any annuity to two (2) minor children of the deceased employee here involved, who were clearly dependent on him for support and whom he supported, as ordered by Montana, to the date of his death—after having been judicially decreed their father.

And under similar circumstances, of course, this Court ruled an Illinois statute unconstitutional in *Trimble* v. *Gordon, supra,* because it discriminated against illegitimate children in an impermissible manner and because the statutory classification of *"children"* was not "substantially related to permissible state interests." In *Lalli* v. *Lalli, supra,* this Court referred to its ruling in *Trimble,* as follows, at 99 S.Ct. 524:

> "As illustrated by the facts in *Trimble* even a *judicial declaration of paternity* was insufficient to permit inheritance." [Italics supplied.]

And, in *Lalli* v. *Lalli, supra,* this Court upheld a New York statute as constitutional because it enabled illegitimate children freely to inherit from their deceased father if, *during his lifetime, paternity was established judicially* (see 99 S.Ct. 524-527).

In the case at bar, *paternity* was established by a Montana court *during the deceased father's lifetime.* That same decree *established the full dependency of Shawn and Tricia upon their lawful father for support—and he did support them to his death. Ergo,* here the Court of Claims was obviously correct when it ruled (Jurisdictional Statement, *App. A,* page 3a):

> "Here, on the other hand, there is no dispute over the facts of parentage, recognition, and support. *Indeed, a prior, valid judgment is conclusive on these points* . . . .
>
> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown they have a right to recover the benefits provided by 5 U.S.C. § 8341(e)."

One last matter requires brief comment. The Jurisdictional Statement, at pages 9, 10, falsely implies that Shawn and Tricia filed *"a late claim"* for their annuity benefits under 5 U.S.C. 8341—as a result of which, the benefits were paid to the deceased employee's father. This is totally wrong. Almost immediately after their

father's death in August, 1974, appellee filed Shawn's and Tricia's claim with the Civil Service Commission. That claim was denied on September 27, 1974—just a little more than one (1) month after their father's death—solely because of the "lived-with" provision of 5 U.S.C. 8341(a)(4)(A). The Government thereupon erroneously paid the annuity to the deceased employee's father. But, from the very outset, the recipient grandfather agreed readily to refund the payment if the Government found Shawn and Tricia eligible in his place.

Finally, when the Court of Claims rendered its final "consent money judgment" in favor of Shawn and Tricia on November 6, 1978, it simultaneously entered a third-party *pro confesso* judgment against the grandfather directing that the erroneous payment be refunded, the Court having found that at no point did the grandfather oppose the Government's third-party claim. (Jurisdictional Statement, *App. B*).

Clearly, therefore, the Court of Claims' judgment should be affirmed in every respect, and the Government's astounding, misdirected Jurisdictional Statement and appeal must be dismissed.

IV.

The Government Has Already Deprived the Minor Children in This Case of Their Lawful Annuity for Almost Five (5) Years, and When It Finally Stipulated to Entry of Judgment in the Court of Claims, It Withdrew Its Previously-Asserted Reservation of Right to Appeal Therefrom to This Court. In Justice, Therefore, the Court of Claims' Judgment, Entered Pursuant to the Government's Stipulation, Should Be Summarily Affirmed Without Further Costly Litigation in This Court

Shawn and Tricia Clark lost their father, and the support he provided, in August, 1974—almost five (5) years ago. The Government, in turn, has succeeded in depriving them of their lawful statutory annuity year after year since their father's death—and now it is asking this Court to delay the day of final reckoning even longer.

In July, 1978, when the Government finally agreed to execute a stipulation for final money judgment in the Court of Claims, it originally sought to reserve the right to appeal to this Court from both the January 27, 1978 summary judgment and the November 6, 1978 consent judgment of the Court of Claims in this case. Counsel for appellee rejected the Government's proposed stipulation, reminding counsel for the Government that the time to appeal from the January 27, 1978 summary judgment had expired; and that the Government had indicated previously it did not intend to appeal from any consent judgment thereafter entered by the Court (*Appendix B* hereto).

The pending stipulation was thereupon redrafted to eliminate all references to reservations of right to appeal; it was executed by the Government and accepted by the Court (*Appendix C* hereto).

Under such circumstances, we submit, it would clearly be unjust and oppressive for this Court to entertain the Government's groundless appeal at this late date and thereby force Shawn and Tricia, minor children without the necessary means, to endure further costly litigation in this long-pending case.

CONCLUSION

The judgments of the Court of Claims should be affirmed and the appeal herein should be dismissed.

Respectfully submitted,

EDWARD L. MERRIGAN
Attorney For Appellee
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BROADWATER

No. 5625

PATRICIA ILENE CLARK, *Plaintiff*,

v.

GEORGE GERALD ISAACSON, *Defendant.*

Findings of Fact, Conclusions of Law and Judgment

The above-entitled cause came on regularly for trial on the 15th day of May, 1972, before the Court sitting without a jury, Hubert J. Massman, of the Law Firm of Massman, Funk & Swanberg, Horsky Block, Helena, Montana, appearing as counsel for the Plaintiff, and Lloyd J. Skedd, 1225 Eleventh Avenue, Helena, Montana, appearing as counsel for the Defendant, and said action being tried on the 15th, 16th and 17th days of May, 1972, and evidence both oral and documentary having been introduced for and on behalf of the respective parties, and said cause having been duly submitted for decision, and the Court having considered the evidence and the law applicable thereto finds as facts the following:

Findings of Fact

1. That the Plaintiff, PATRICIA ILENE CLARK, is the mother of SHAWN DOUGLAS CLARK, who was born at St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital, Helena, Montana, on January 28, 1971;

2. That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, above described;

3. That GEORGE GERALD ISAACSON is regularly employed and is earning a gross annual salary in excess of Twelve Thousand Five Hundred and no/100 Dollars ($12,000.00), and that PATRICIA ILENE CLARK is regularly employed and is earning a gross annual salary in excess of Eight Thousand Five Hundred and no/100 Dollars ($8,500.00);

4. That the parties stipulated in open Court as follows:

(a) Defendant pay Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) in full and final settlement of any and all past obligations of every kind and nature whatsoever.

(b) Defendant shall change the beneficiaries on the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries:

(1) New York Life Insurance Policy for Ten Thousand and no/100 Dollars ($10,000.00);

(2) Federal Employees Group Life Insurance Policy for Fifteen Thousand and no/100 Dollars ($15,000.00).

(c) Defendant pay Plaintiff the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said minor children, SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, Ten and no/100 Dollars ($10.00) of which represents medical insurance coverage;

5. The Court finds that the stipulations of the parties are fair and reasonable under the circumstances of this case.

Conclusions of Law

1. That PATRICIA ILENE CLARK is the monther, and GEORGE GERALD ISAACSON is the father, of SHAWN DOUGLAS CLARK, born at St. John's Hospital in Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born in St. Peter's Hospital in Helena, Montana, on January 28, 1971.

2. That the stipulations of the parties, found reasonable and just by this Court, should be made a part of the Judgment in this cause.

Judgment

Upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK, who was born in St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital in Helena, Montana, on January 28, 1971.

(2) That Defendant pay to the Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) as full and final settlement of all past obligations between the parties of every kind and nature whatsoever.

(3) That Defendant pay to the Plaintiff, through the Clerk of the above-entitled Court, the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said children (Ten and no/100 Dollars ($10.00) of which shall represent medical insurance costs for each child); said payments shall commence on the 1st day of June, 1972, and shall be paid on the 1st day of each month thereafter until such time as each of the said children shall reach their age of majority.

(4) That Defendant change the beneficiaries under the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries, to-wit:

(a) New York Life Insurance Policy in the amount of Ten Thousand and no/100 Dollars ($10,000.00).

(b) Federal Employees Group Life Insurance Policy in the amount of Fifteen Thousand and no/100 Dollars ($15,000.00).

The change in beneficiaries herein ordered shall be subject to Court approval.

DATED this 2nd day of June, 1972.

/s/ GORDON R. BENNETT
District Judge

APPENDIX B

[LETTERHEAD OF EDWARD L. MERRIGAN, ATTORNEY]

July 31, 1978

Donnie Hoover, Esq.
Trial Attorney
Court of Claims, Section
Civil Division
U. S. Department of Justice
Washington, D. C. 20530

Re: Patricia Ilene Clark, et al.

Vs: United States Court of Claims No. 285-76

Dear Mr. Hoover:

Receipt of your letter of July 28 is hereby acknowledged. I am at a loss to understand why your recent correspondence to me was misdirected, and why now, at this late date, your proposed stipulation for judgment suddenly reserves the right to appeal or petition for certiorari.

Regarding the misdirected correspondence, all prior recent letters from you to me were correctly directed to 6000 Connecticut Avenue, N. W. Thus, certainly your file contains my correct mailing address.

With reference to the stipulation, it was my specific understanding that the Government had decided not to continue this long malingering litigation beyond entry of judgment in the Court of Claims. In this regard, the Government did not appeal or petition for certiorari with reference to the judgment entered in this case on January 27, 1978 within the prescribed statutory period. Secondly, when Judge Wood wrote to counsel on March 30, 1978 advising

that the Court's judgment of January 27, 1978 "has now become final," you specifically replied as follows:

> ". . . please be advised that the Civil Service Commission is prepared to make payments to the claimants herein. In this regard, the Commission is now in the process of making the necessary computations in the matter. Upon receipt of the aforementioned computation from the Commission, I believe that counsel for plaintiffs and myself will be able to stipulate to the entry of judgment.
>
> "Also, at that time, defendant will request that judgment be entered against Mr. George Isaacson based upon defendant's third party claim. However, this should not affect the plaintiffs' rights or entitlements in any way. Thus, no delay is anticipated as a result of defendant's third party claim.
>
> "Finally, I have been informed that the Commission needs approximately 30 days within which to complete its computation."

Now, more than 90 days later, you submit a stipulation which suddenly twice reserves the right to appeal or petition for certiorari.

Clearly, after final judgment is entered in this case, I cannot stop the Government from appealing or petitioning for certiorari if it intends to ignore its prior representations and albeit its statutory right to apply for review of the substantive judgment of January 27, 1978 has clearly expired. But, certainly under the circumstances present here I do not intend to sign a stipulation so providing. Thus, I have redrafted the proposed stipulation so as to eliminate all references to the Government's asserted right to appeal or petition for certiorari. If the Government still has such rights as a matter of law, or if it intends to endeavor to assert such rights contrary to its prior represen-

tations herein, it may do so without the benefit of my stipulation.

Accordingly, please let me hear from you immediately upon receipt of this letter and the enclosed redrafted stipulation as to whether you are prepared to sign and file same as redrafted. If so, please send me an executed copy. If not, I will have to apply to Judge Wood for entry of judgment based on the Civil Service Commission's computations, which you have certified as being true and correct.

Looking forward to your immediate advice, I am,

Very truly yours,

/s/ Edward L. Merrigan

ELM/rl
Enclosure

cc: Judge Wood

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, *et al., Plaintiffs,*

v.

THE UNITED STATES, *Defendant.*

Stipulation for the Entry of Judgment

For the purpose of enabling the Court to render final judgment in this case, it is hereby stipulated by and between the attorneys for the parties hereto as follows:

1. By Order dated January 27, 1978, the Court of Claims granted the plaintiffs' motion for summary judgment, entered judgment on the issue of liability for plaintiffs, and remanded the case to the Trial Judge for further proceedings under Rule 131(c) to determine the amount to be awarded consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

3. It is further stipulated that the amount to be awarded to plaintiff Patricia Ilene Clark on behalf of Tricia Deanne Clark consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

4. It is further stipulated that the amounts reflected in Paragraphs 2 and 3 above are computed up to June 30, 1978, and that Shawn Douglas Clark and Tricia Deanne Clark shall be placed on the appropriate Civil Service annuity pursuant to 5 U.S.C. § 8341(e), from June 30, 1978 and until their eligibility expires.

5. This stipulation is made for the purpose of enabling the Court to enter a final judgment in favor of the plaintiff, Patricia Ilene Clark, in her capacity as legal guardian for Shawn Douglas Clark and Tricia Deanne Clark, in the total amount of $14,162.66, provided the Court accepts this stipulation in its entirety. However, in the event this stipulation is rejected in whole or in part by the Court, it is agreed that this entire stipulation shall be void and of no effect whatsoever.

Respectfully submitted

/s/ EDWARD L. MERRIGAN
Edward L. Merrigan
Attorney for Plaintiffs

/s/ BARBARA ALLEN BABCOCK
Barbara Allen Babcock
Assistant Attorney General
Civil Division

/s/ DONNIE HOOVER
Attorney, Civil Division
Department of Justice